STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING JUDGE DEREK G. JOHNSON	**DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Derek G. Johnson of the Orange County Superior Court. Judge Johnson and his attorney, Paul S. Meyer, appeared before the commission on December 5, 2012 to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Johnson and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Johnson has been a judge of the Orange County Superior Court since 2000. His current term began in January 2009.

Judge Johnson is publicly admonished for remarks he made while sentencing a defendant convicted of rape and other sexual assault offenses. The comments created the impression that the judge was not impartial in cases involving rape without serious bodily injury showing resistance by the victim.

On June 20, 2008, Judge Johnson presided at sentencing in *People v. Metin Riza Gurel*. The defendant had been convicted at a jury trial held before the judge of rape, forcible oral copulation, domestic battery with corporal injury, stalking, and three counts of criminal threats, with use of a deadly weapon as to one count of criminal threats.

The underlying facts are set forth in the Court of Appeal's nonpublished opinion affirming the defendant's convictions. The defendant and the victim began dating in 2004 and moved in together in 2006. While they lived together, the defendant threatened the victim with a knife and threatened to slash her throat with a broken compact disk. The victim reported this conduct to the police in early 2007, and the defendant moved out at her request, but the two continued to date on and off until September 2007. They had consensual sex in October 2007. After they stopped dating, the victim continued communicating with the defendant but became increasingly concerned he would hurt her. At one point, the victim found her front door lock jammed so it could not be locked, and was unable to access her home computer. She believed that he had access to her computer because he knew everything she was doing. In the week prior to November 10, 2007, the defendant spoke to the victim on the telephone daily. In each conversation, he threatened to get her fired from her job or blow up her car, and claimed he had access to her apartment.

On the night of November 10, 2007, the defendant showed up at a restaurant where the victim was on a date with another man. The defendant referred to the man by name and threatened the victim while making a slicing motion across his throat. When the victim went to her car, she found that one of her tires had been slashed. After she reached home, the defendant called, threatening to blow up her car and cause her to lose her job if she failed to arrive at his apartment within 20 minutes. She went to his apartment where the defendant bruised her breast with a metal baton, shattered her cell phone, heated a screwdriver and threatened to use it to maim her face and vagina, threatened to burn her face and hair with a lit cigarette lighter, and threatened to shoot and kill her. He ordered her to perform fellatio, raped her, and ejaculated in her mouth. The victim did not leave after the defendant fell asleep because he was a light sleeper.

The next morning, the defendant demanded that the victim make him breakfast and told her she would live at his apartment. She convinced the defendant to allow her to return to her apartment on her own to collect her clothing. She drove to the police

station, where she reported the defendant's threats from the previous evening. In an interview about 17 days later, she reported the rape.

At the sentencing proceeding, Judge Johnson heard and rejected the prosecutor's argument that the rape and oral copulation should be considered "separate occasions" mandating full consecutive sentences; he pointed out differences between certain cases cited by the prosecutor and the case before him, and referred to another case as "just a bunch of dicta." The judge then said that he would give counsel a "preview" of what he intended to do. He stated that he intended to impose the mid-term (six years in state prison) on count 1, impose concurrent six-year terms on each of the other six counts, and stay the enhancement, for a total term of six years. The prosecutor asked the judge if he was running the sentences as to counts 1 and 2 concurrent solely because he was finding them to be the same occasion, and continued, "[C]an I ask why the court is exercising its discretionary power ... to run the[m] concurrent, or is the court finding that they're merging for some reason?" The judge said that he was "not finding merger at all," but was finding, after hearing the case, including the preliminary hearing, that the case was "worth six years." Counsel was given an opportunity to be heard and declined. The following then occurred:

> THE COURT: All right. Let me tell you why I'm going to sentence Mr. Gurel to six years only in spite of the People's request for—
>
> MS. SNYDER: Sixteen.
>
> THE COURT: —16. And that is, I spent my last year and a half in the D.A.'s office in the sexual assault unit. I know something about sexual assault. I've seen sexual assault. I've seen women who have been ravaged and savaged whose vagina was shredded by the rape. ***I'm not a gynecologist, but I can tell you something: If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted,***

and we heard nothing about that in this case. That tells me that the victim in this case, although she wasn't necessarily willing, she didn't put up a fight. And to treat this case like the rape cases that we all hear about is an insult to victims of rape. I think it's an insult. I think it trivializes a rape.

MS. SNYDER: May I respond, Your Honor?

THE COURT: Pardon?

MS. SNYDER: May I respond?

THE COURT: I'm just telling you. We don't need to get into a discussion. You are free to join in, but I'm telling you the reasons why I think this case is worth six years because it's the mid-term. There's nothing in mitigation. There's nothing in aggravation. And it's what the jury has put in front of me.

MS. SNYDER: All I wanted to say, Your Honor, was I'm — obviously, it's a rape because she was not willing. I'm not in any way equating this to a stranger rape, to a forcible rape where she was beaten ... so it's not the People's intention and position to in any way trivialize what we normally consider to be true victims of rape. I just — in speaking with her and seeing her testify, I know that she doesn't feel any less of a rape victim because she had a relationship with him or she had at one time engaged in sexual intercourse with him. I understand the court's reasoning when you're looking at the cases in comparison, and I understand the court's position on them being the same occasion. The only thing I would ask, and maybe I shouldn't have submitted as quickly as I did, is on count 1 why the court is not finding there to be any circumstances in aggravation to aggravate the term to eight

years based on the fact that there were threats involved, there was a weapon involved, and just that there are aggravating circumstances that do apply where not many mitigating do? I was just wondering.

THE COURT: I just found the threats to be technical threats. ***I found this whole case to be a technical case. The rape is technical. The forced oral copulation is technical. It's more of a crim law test than a real live criminal case.*** I don't know what more to say.

(R.T. 13:9-15:11, italics added.)

The judge then imposed the six-year sentence.

The commission concluded that Judge Johnson's remarks — which first became known to the commission in May 2012 — were contrary to canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and canon 3B(5), which requires a judge to perform judicial duties without bias or prejudice, and provides that a judge shall not, in the performance of judicial duties, engage in speech or other conduct that would reasonably be perceived as bias or prejudice. The comments suggested the judge was not impartial towards sexual assault victims who do not "put up a fight," by suggesting that they are not victims of a "real" crime. Further, the judge improperly relied on his own "expert opinion" concerning serious bodily injury showing resistance based on his experiences in the district attorney's office, rather than evidence before him. (See *Inquiry Concerning Judge Jose A. Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 204; Public Admonishment of Judge Christine K. Moruza (2008) p. 7.)

Judge Johnson's comments that "if someone doesn't want to have sexual intercourse, the body shuts down," and that "the body will not permit that to happen unless a lot of damage was inflicted," were not based upon any evidence before the court, but upon his experience in the district attorney's office involving other cases. The judge's statement that the lack of physical damage showed that the victim "didn't put up

a fight," along with his comment immediately thereafter that treating the case before him like other rape cases was "an insult to victims of rape" and "trivializes rape," reflected his own view that a victim must resist in order for there to be a "real" sexual assault — a view that is inconsistent with California law, which since 1980 has contained no requirement of proof that the victim of rape either resisted or was prevented from resisting because of threats. (See Pen. Code, § 261; *People v. Iniguez* (1994) 7 Cal.4th 847, 854-856.) Judge Johnson's reference to the rape and forced oral copulation as "technical," and his statement that the case was "more of a crim law test than a real live criminal case," similarly signaled his own view that there must be resistance by the victim and associated infliction of serious bodily injury in order for there to be a "real" case involving more than a "technical" sexual assault.

In his response to the commission and at his appearance, Judge Johnson conceded his comments were inappropriate and apologized. He explained that his comments were the result of his frustration with the prosecutor whom he believed was requesting a sentence not authorized by law. He stated that he was attempting to respond to the prosecutor's arguments on the issue of whether the rape and forced oral copulation should be considered "separate occasions" for sentencing purposes, and to distinguish the more aggravated cases cited by the prosecutor. The commission found, however, that none of Judge Johnson's statements set forth above pertained to the prosecutor's argument concerning "separate occasions" or to the cases cited by the prosecutor.

In the commission's view, the judge's remarks reflected outdated, biased and insensitive views about sexual assault victims who do not "put up a fight." Such comments cannot help but diminish public confidence and trust in the impartiality of the judiciary. At a minimum, the judge's conduct constituted improper action.

For the forgoing reasons, the commission has determined to impose this public admonishment.

The vote of the commission to impose a public admonishment was 10 ayes and 0 noes. Commission members Mr. Lawrence J. Simi; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. Judith D. McConnell; Nanci E. Nishimura, Esq.; Mr. Adam N.

Torres; Ms. Maya Dillard Smith; Ms. Sandra Talcott; Mr. Nathaniel Trives; and Hon. Erica R. Yew voted for a public admonishment. Commission member Hon. Frederick P. Horn was recused.

Dated: December 13, 2012

Lawrence J. Simi,
Chairperson